UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

LOCAL UNION NO. 18 OF SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION ("Local 18")

and Case 30-CD-078120

TOTAL MECHANICAL ("TOTAL")

and

LOCAL UNION 601 STEAMFITTERS AND
REFRIGERATION/SERVICE FITTERS ("Local 601")

POST-HEARING BRIEF OF TOTAL MECHANICAL

I. INTRODUCTION

Service technician work has for many years been assigned by TOTAL Mechanical and other mechanical contractors in the Fourteen County WI area to employees represented by both Local 18 and Local 601. TOTAL should be allowed to continue its 24 year practice of assigning the Work in Dispute to employees represented by Local 601 and Local 18. On February 21, 2012, Local 601 representatives stated that service technician work should be assigned exclusively to employees represented by Local 601. When Local 18 was told of this and the possibility contractors might change the work assignment, Local 18 immediately stated it would take action to protect its work jurisdiction.[1] Three weeks later, when told in writing of Local 601's jurisdictional claim, Local 18 stated in writing that it would picket if contractors changed the work assignment.

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[1] Local 18's job classification for this work is Environmental Services Technician ("EST") (Tr. 129). There are many Local 18 journeymen who became qualified to perform service work through on-the-job experience rather than Local 18's EST apprentice program (Tr. 65).

Local 601 asserts it has made no claim for exclusive jurisdiction over service technician work. In addition, Local 601 claims that Local 18's threats to picket were the product of collusion, a sham, or otherwise not genuine. Local 601 offered little or no evidence to respond to TOTAL's compelling proof that 10(k) work assignment criteria would favor a continuation of and an award of TOTAL's service technician work in the Fourteen County WI Area to employees represented by both Local 18 and Local 601. Such a determination by the NLRB would not change the contractor preference/practice, the area assignment practice, oust Local 18 employees from established jurisdiction, or give exclusive jurisdiction to employees Local 601 represents. In contrast, awarding exclusive jurisdiction to Local 601 employees would deprive Local 18 employees of a long-standing work assignment and undermine the healthy diversity of TOTAL's service work force.

The parties stipulated that there is no agreed to alternate mechanism for the resolution of jurisdictional disputes (Tr. 193-193). The parties also stipulated to the following description of the work in dispute (Tr. 10):

> "Service technician work on TOTAL Mechanical jobs for commercial, industrial and residential customers in the Wisconsin counties of: Milwaukee, Ozaukee, Washington, Waukesha, Green, Jefferson, Lafayette, Rock, Columbia, Dane, Iowa, Marquette, Richland, and Sauk ("Fourteen County WI Area"). Service technicians perform work to keep operational mechanical and HVAC systems and equipment within occupied facilities, including inspection, service, maintenance, start-up, testing, balancing, adjusting, repairing, modifying and replacing mechanical and HVAC equipment."

II. STATEMENT OF FACTS

A. TOTAL Mechanical.

TOTAL is a full service mechanical contractor with jobs throughout Wisconsin (Tr. 116-117).[2] TOTAL has five (5) divisions: Service; Plumbing; Fire Protection; Electrical; Commercial

[2] As a full service mechanical contractor, TOTAL does both residential and commercial heating, ventilating and air conditioning work (Tr. 116-117). This work involves the sheet meal, steam piping, plumbing, fire protection and electrical trades (Tr. 117). CP Exh. 8 describes TOTAL's industrial and commercial services; CP Exh. 9 describes TOTAL's residential services (Tr. 116-117).

Group (Tr. 116; CP. Exh. 8). The Service Division, which Tim Braun heads, employs service technicians to perform the Work in Dispute (Tr. 115, 119; CP Exh. 13).

Especially relevant to this case are the following union relationships TOTAL has:

(1) Local 601 relationship for the Fourteen County WI Area through the Plumbing and Mechanical Contractors Association of Milwaukee and Southeastern Wisconsin ("PMC") (Jt. Exh. 3).[3]

(2) Local 18 relationship throughout Wisconsin, including for the six (6) County Area (Milwaukee, Ozaukee, Washington, Dodge, Waukesha and Jefferson Counties) through the Sheet Metal and Air Conditioning Contractors Association of Milwaukee ("SMACCA") (Jt. Exh. 2).[4]

(3) The 2010-2015 National Service and Maintenance Agreement ("NSMA") to which TOTAL became an independent signatory in 1998 (Jt. Exh. 1; Tr. 142).

B. TOTAL's Service Division Growth.

Twenty-four years ago the Service Division employed three service technicians (Tr. 120-121, 126). Throughout a 24 year growth period, the number of service technicians represented by Local 18 and Local 601 has increased dramatically (Tr. 121, 126). As of April, 2012, 30% of TOTAL's work force consisted of service technicians (Tr. 122).[5] The Service Division currently represents 20% of TOTAL's business volume (Tr. 120).

TOTAL currently employs 30-40 service technicians (Tr. 122). In 2008 when substantially more hours were being worked, TOTAL regularly employed 40 to 50 service technicians as journeymen and apprentices (Tr. 127-128; CP Exh. 11). Presently the service technician work force consists of 18 Local 18 employees and 11 Local 601 employees (CP Exh.

[3] The PMC is part of the Plumbing Mechanical Sheet Metal Contractors' Alliance ("Alliance") (Tr. 27, 28).
[4] The SMACCA is also part of the Alliance (Tr. 28).
[5] TOTAL's field service staff is approximately one-third the size it was in 2008 (Tr. 121-122).

10).[6] In the last 15 months, Local 18 provided TOTAL with regular service technicians who worked 49,000 hours (CP Exh. 11). During the same period, Local 601-represented service technicians worked 27,500 hours for TOTAL (CP Exh. 11). In the last 24 years, TOTAL has never exclusively employed service technicians Local 601 or Local 18 represented (Tr. 129).

Braun described his business plan to grow the Service Division as follows (Tr. 129):

> "A. I grew the division through the apprenticeship program of both Local 601 and 18. I am a firm believer in the apprenticeship program. My business plan for the service group revolved around a well-diversed, well-educated group of people. And that's why I mixed both Local 18 and 601 together.
>
> Q. So over the 24 years, have you had both employees represented from Local 601 and Local 18 from the beginning of your 24-year time frame?
>
> A. That is correct."

TOTAL has taken full advantage of the fact that Local 601 and Local 18 have comprehensive apprenticeship training programs that joint apprenticeship training committees oversee (Tr. 43). Both training programs have subdivisions for service technician training (Tr. 43; CP Exhs. 6 and 7). The training programs of both unions "do an excellent job" of "making sure that the industry is supplied with well-trained productive workers" (Tr. 43). The programs are always "evolving" and they work hard "keeping abreast of things" (Tr. 48).[7]

Having workers from diverse sources leads to "diversity in the work force," "cross-polinization of knowledge" and "friendly competition" (Tr. 49). "[O]ver all the years of experience ... having both sources of this highly trained work force is a beneficial thing for the contractor and their customers and the industry as a whole" (Tr. 49). Many Alliance contractors "have a business model that embraces using technicians" from Local 18 and Local 601 (Tr. 49-50). Exclusive jurisdiction for Local 601 "would destroy that model" (Tr. 50).

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[6] Dual service technician crews in a three county of southeastern WI area are used when Steamfitters Local 118 rather than Local 601 represents service technicians (Tr. 125; CP Exh. 11).

[7] The Local 18 and Local 601 apprentice programs are five years (Tr. 45). Local 601's program is 8000 hours (Tr. 45). Local 18's program is 9000 hours (Tr. 45). Both programs involve day school, night school, and on-the-job training hours (Tr. 47). Both training programs have existed since at least the mid-1980s (Tr. 47). "There is virtually entire overlap" between the two training programs (Tr. 48). The training programs are "evolving" all the time; they are "almost in competition with each other" (Tr. 48).

Service work is "a significant portion" of the work that mechanical contractors perform for customers (Tr. 52). The work is "qualitatively important" because "service business leads to other business" and it is "more regular" and generates "consistent" cash flow as compared to new construction work (Tr. 52).

C. TOTAL's Service Technician Dispatch System.

TOTAL has two dispatchers for service technician jobs (Tr. 131). Service technicians are assigned to customer jobs based upon considerations of availability, skill level, geographic proximity, and customer relationship (Tr. 131-132). The union affiliation of a service technician is not a dispatch consideration (Tr. 131).

The nature of the service work is such that TOTAL completes over 20,000 service technician jobs each year (CP Exh. 11). Each service technician job averages two to two and one-half hours; in a typical day a service technician will complete three customer jobs (Tr. 132-133). Normally, one service technician is assigned to a complete typical customer job (Tr. 132). TOTAL's service technicians in the last year completed well over 20,000 service jobs (Tr. 133).

There are times, however, when a crew of two or more would be assigned to a project or when apprentices would be assigned to work with journeyman service technicians (Tr. 134; CP Exh. 12). In the former circumstance, the crew could easily include service technicians represented by Local 601 and Local 18 working together (Tr. 134; CP Exh. 12). As to apprentices, an apprentice from one union could easily be assigned to a journeyman service technician represented by the other union (Tr. 132). Customers have no idea of the union affiliation of the service technicians or apprentices assigned to their jobs (Tr. 132).

Tim Braun testified about the importance to TOTAL of employing service technicians represented by both Local 18 and Local 601 (Tr. 129-130):

> "A. Once again, I wanted to have a well-diverse group of people, and I felt that both unions had something to offer in that respect. They are both very highly

educated groups of people. Both unions and their training schools continue to try to outdo themselves to produce the best end product that they can, which is just a benefit for the end user, which is myself, the contractor, and for our customers out there. So that's the reason why I built it using both 601 and Local 18.

* * * * *

A. Once again, with the training that goes on and the ability of both unions to keep stepping up and giving us the well-trained technicians, it has allowed us to pursue other opportunities out there with our customers that we may not have been able to before. So with all the training and everything that's going on, it's allowed us to pursue things that we wouldn't have been able to before."

D. TOTAL Mechanical's Assignment Preference.

TOTAL's clear assignment preference is to be able to continue the dual assignment practice it has come to depend on over the years (Tr. 130, 136). TOTAL's successful business model for the Service Division depends on employing service technicians represented by both unions, making work assignments without regard to union affiliation and doing so based on business considerations of availability, skill, geographic proximity and customer relationship (Tr. 139-130).[8]

Employing workers represented by Local 601 and Local 18 has given TOTAL access to the most qualified service technicians each union can provide (Tr. 129-130). Drawing qualified workers from both unions has assured that qualified workers are always available (Tr. 129-130). Because the service technicians and the two unions have had to anticipate technological advances, TOTAL's service technicians are trained in the newest and most productive service methods (Tr. 129-130). The healthy competition between the unions and the workers they represent benefits TOTAL in terms of greater efficiency, productivity, and worker performance (Tr. 129-130, 136). Tim Braun summarized TOTAL's assignment preference this way (Tr. 136):

"A. It should be at our discretion, the contractor's discretion as far as who we dispatch to what call. And the reason for that is productivity, keeping your customers happy, trying to keep your costs down by not taking a guy from one side of town to the other side of town. So it should be at our discretion as far as who we send to what all [sic]."

[8] The business model is not built around labor costs which total approximately $58/hour for Local 601 and $56/hour for Local 18 (Tr. 50).

Tim Braun also explained when he testified that the availability of sufficiently qualified Local 601 service technicians would be a concern (Tr. 145-146):

> "A. I could tell you right now that 601 would not be able to give me 30-plus technicians, so it would create a huge hardship on our company. And once again, I have Local 18 and 601 journeymen and apprentices that are assigned to specific customers. Those customers want to see those individuals. And if I have to lay off a Local 18 guy that is associated with a specific customer, I most likely will lose that customer. That's how married they are to the technicians. So, once again, it would be a huge financial hardship on the company."

E. TOTAL Mechanical's Assignment Practice.

Consistent with TOTAL's stated assignment preference is its assignment practice for the last 24 years. TOTAL has openly carried out the dual assignment practice as the centerpiece of the business model Tim Braun described (Tr. 136-137). Local 601 and Local 18 have known about the dual assignment practice and its evolution for the 24 years (Tr. 51, 136-137). Neither union, until Local 601 did so in February of this year, has claimed exclusive jurisdiction over service technician work (Tr. 137). Hundreds of thousands of customers jobs have been completed by service technicians represented by Local 18 and Local 601 (Tr. 51, 136-137). Until now, this has taken place without question or challenge by either union for at least 24 years (Tr. 51, 136-137).

F. The Area Assignment Practice.

The PMC represents many mechanical contractors who are similarly situated to TOTAL and who perform substantial service technician work in the Fourteen County WI Area (Tr. 32; CP Exh. 3). In addition, the SMACCA represents many of the same mechanical contractors regarding the Local 18 CBA (Tr. 32; CP Exh. 4). "Virtually all" mechanical contractors have CBA relationships with Local 601 and Local 18 (Tr. 33; CP Exhs. 3 and 4). Peter Lentz testified that those contractors have dual assignment practices (Tr. 41-42):

> "The assignment of service work is made to both members of Local 601 and Local 18 who are skilled and trained in that sort of work."

While the number and proportion of service technicians represented by each union might vary, none of those contractors assigned service technician work exclusively to employees represented by Local 601 or Local 18 (Tr. 42, 139). Neither union challenged the area dual assignment practice nor claimed exclusive jurisdiction in the 14 years Lentz has led the relevant multi-employer associations (Tr. 40, 42, 51).

G. Assignment Practice of NSMA Contractors.

The PMC represents eight (8) contractors which are independent signatories to the NSMA, including TOTAL (CP Exh. 5; Tr. 36-37).[9] Peter Lentz testified without contradiction that NSMA contractors for at least a decade have followed the general area dual assignment practice regarding the Work in Dispute (Tr. 42). The substantial work force presence and the practice of assigning service technicians work to employees represented by Local 601 and Local 18 has never been challenged or questioned by either union under the NSMA, including in the pre-lockout period in 2004 (Tr. 111-112).

TOTAL became a signatory to the NSMA in 1998 (Tr. 142). The NSMA has had an unchanged statement of jurisdictional claims over the 14 year period TOTAL has been a signatory (Tr. 142, 144). NSMA service work was always subject to the dual practice (Tr. 42).

H. Contractual Claims to Service Technician Work.

The three relevant labor contracts contain jurisdictional descriptions which include service technician work (Jt. Exhs. 1-3; Tr. 142). The claims are stated using different terms and with greater and lesser degrees of specificity (Jt. Exhs. 1-3; Tr. 33-36). The jurisdictional claims of each labor contract include claims to the work in dispute (Tr. 34).

[9] The NSMA-covered contractors listed in CP Exhs. 5, including TOTAL, are among the largest contractors that the PMC represents (Tr. 37). Most of the listed contractors have been PMC-represented and NSMA-covered for a number of years (Tr. 37-38).

I. The February 21, 2012 Local 601 Labor/Management Meeting.

The Local 601 and Association bargaining committees meet periodically to review and discuss relevant labor issues (Tr. 53). Lentz described the purpose of the meting as setting the table for the upcoming negotiations (Tr. 72). Zielke described this as a meeting preliminary to negotiations at which the parties were "feeling each other" on positions, concerns and issues (Tr. 194). Such a meeting was held on February 21, 2012 which Kevin LaMere and Joel Zielke attended for Local 601 and which two Association executives and five (5) contractor representatives attended (Tr. 54). Peter Lentz and Tim Braun who testified at the hearing attended the dinner meeting for the PMC (Tr. 54). What Local 601 representatives said at the meeting about service technician work is substantially disputed, as discussed below.

Both Lentz and Braun testified that LaMere told them that service technician work was "our work" and that Local 601 believed service work had to be performed exclusively by employees it represented (Tr. 55, 56, 139). Peter Lentz recalled, among other topics, that there was a discussion of rumors concerning 601's maybe changing attitude with regard to the service technician work (Tr. 55). After discussing the state of the economy, labor/management cooperation, and industry issues facing the contractors, the discussion turned to service technician work, during which LaMere said "we consider that to be our work" (Tr. 55-56). LaMere said, "Service work is our work" (Tr. 56). In addition, LaMere said that the NSMA "clearly provides that it [service work] is our work and we consider it to be our work" (Tr. 56). Zielke confirmed LaMere's position in this regard (Tr. 56). According to Lentz, this "sucked the oxygen out of the room at that point." These statements to Lentz were a clear "expression by Local 601 that they were at that point claiming exclusive jurisdiction" (Tr. 56) and "a stark indication of a departure from an established pattern in our industry" (Tr. 57).

Braun recalls that just as the group sat down for dinner, LaMere said contractors were "in violation of their contract because we were using Local 18 EST's to do contract work" (Tr.

139). LaMere said the contract "very specifically states" that contractors "have to use UA members only" (Tr. 139). LaMere said the use of Local 18 ESTs "was going to cause a problem" and that contractors "needed to basically get rid of our Local 18 guys to stay within compliance" (Tr. 139-140). LaMere went on to say that Local 601 was "more than willing to open his arms to the Local 18 ESTs to bring them into 601's association so that we could be in compliance ..." (Tr. 140). LaMere looked at Braun and said, "I know how many EST employees you [TOTAL] have" (Tr. 140).[10] Joel Zielke pretty much "mirrored" LaMere's statements when he talked about service technician work (Tr. 140).

This was a new work claim that LaMere was making (Tr. 141). "Kevin LaMere was basically saying that we were in violation of our contract and that we had to use strictly 601 service technicians" (Tr. 141). This was a "serious matter" to Braun because "it would definitely change my business plan," causing "a huge hardship" and "financial burden" for TOTAL (Tr. 141). The remarks threw the contractors "for a loop" that this "was an issue now" (Tr. 141). Finally, Braun took the issue personally because LaMere told him, "I know how many ESTs you have" (Tr. 142). Neither LaMere nor Zielke specifically stated where and when Local 601 would take action to obtain exclusive jurisdiction (Tr. 76-77, 109-110, 113).

LaMere testified Local 601 did not make a work jurisdiction claim but instead was simply offering an interpretation of the NSMA pursuant to which Local 601's jurisdiction over the work in dispute would be exclusive. There may have been some mention by LaMere of service work in connection with the NSMA (Tr. 73-76, 151). But the things LaMere and Zielke said did not limit the work assignment issue to NSMA-covered contractors only (Tr. 75-76, 152). This "interpretation" was contrary to the prior practice, contrary to Local 601's admission that its work jurisdiction was "not exclusive" under the 14 County WI Area CBA, and contrary to the practice that jurisdiction over service work had never before been exclusive under the NSMA. Zielke

[10] LaMere denied making this statement (Tr. 210).

acknowledge that nothing had changed to give rise to Local 601's new interpretation or to explain it in comparison to the established contrary area practice for the eight (8) NSMA-covered contractors the PMC represents, including TOTAL (Tr. 198).

J. The March 1, 2012 Meeting with Local 18.

Because the statements of LaMere and Zielke affected just about every mechanical contractor in the area, the contractors thereafter met to discuss this development (Tr. 143). An "emerging consensus" was formed that the work assignment might have to be changed (Tr. 57, 79). The contractors understood from the remarks of LaMere and Zielke that it was not just NSMA-covered contractors whose work assignment practices would be at risk (Tr. 91).

The contractors knew Local 601 would take action based on LaMere's remarks (Tr. 109). They did not know when or how Local 601, who are "people of action," would pursue the issue (Tr. 109-110, 113). According to Lentz, Local 601 representatives made the statements they did because "they were interested in making a point and we took that point" (Tr. 114).

This led to Braun and Lentz to meet with the Business Manager of Local 18, Pat Landgraf (Tr. 57). Braun and Lentz met with Landgraf on March 1st to tell him Local 601's claim and about the "possible decision or probable decision" the contractors were facing given Local 601's claim of exclusive jurisdiction (Tr. 58). They wanted to "cushion the blow of having to not use Local 18 workers anymore for doing service work" (Tr. 58).

Landgraf had an immediate and strong negative reaction (Tr. 58). Landgraf said, "I'm not going to stand for that. We're going to fight for our jurisdiction. We will do whatever we need to do" (Tr. 59). Landgraf said Local 18 would be "picketing" and "something to the affect you're going to see picket lines" (Tr. 59). Braun recalls that Langraf responded that "he would definitely turn around and strike us" if contractors laid off "any of his people due to this particular issue" (Tr. 144).

Landgraf told Lentz and Braun that there were ways for Local 18 to deal with this (Tr. 59). Landgraf told Lentz to check with legal counsel to find out about the "avenues" for doing this (Tr. 59, 180).

K. The Lentz and Landgraf March, 2012 Emails and Letters.

Given Local 18's verbally stated intentions, Lentz and Landgraf had follow-up communications about dealing with this jurisdictional dispute. PMC representatives were not familiar with the Section 10(k) process (Tr. 92-93; 102-103); Landgraf was (Tr. 179). Landgraf told Lentz and Braun on March 1st to check with PMC legal counsel about ways to resolve the dispute (Tr. 180). PMC thought the two unions would fight this out and that Local 18 would start the Section 10(k) proceeding (Tr. 76-77). Lentz later communicated to Landgraf additionally that PMC itself might start the Section 10(k) proceeding (Tr. 185). When PMC learned that affected contractor(s) would have to be involved, TOTAL was identified because Local 601's new jurisdiction claim would affect TOTAL more than any other PMC-represented contractor (Tr. 96-97). For a time in March, Lentz thought the two unions would resolve the issue after receiving a letter from the PMC that would start their process for resolving the dispute (Tr. 60). Lentz later learned (not from Local 18) that an affected contractor, not PMC, would have to start the NLRB process (Tr. 61).

Neither Lentz nor Landgraf spoke of a strike threat as important for commencing a 10(k) proceeding (Tr. 83). In the March 1st meeting, they did not discuss contractors taking any specific action (Tr. 93). Without having discussed a letter with Landgraf, Lentz always intended to follow-up on the March 1st meeting with a letter to Landgraf (Tr. 87-88).

Once things were clarified, PMC sent Landgraf the letter of March 21, 2012 (Tr. 60-61; CP Exh. 1). The letter described the choice contractors were facing because of Local 601's claim of exclusive jurisdiction (Tr. 61; CP Exh. 1). TOTAL was identified as the most affected contractor (CP Exh. 1). TOTAL as a large contractor "would be most severely impacted because I was well aware of their basic business model and philosophy of using both" (Tr. 61).

Because TOTAL generally tried to balance the number of Local 18 and Local 601 service technicians, Lentz knew "this would definitely hurt their way of doing business" (Tr. 62). Lentz did not know what reply, if any, Local 18 would make to his letter (Tr. 93). There was no understanding that Local 18 would reply with a threat (Tr. 93). Landgraf's responses, both verbally and in writing, were to service work generally, not just NSMA-covered service work (Tr. 184).

By letter dated March 26, 2012, Landgraf wrote to Lentz (CP Exh. 2):

> "We understand that there has been a demand that the Association and specifically Total Mechanical Inc. and other member contractors exclusively assign service work to employees represented by another union. This is work covered by our labor agreement and historically performed by employees represented by Local 18.
>
> This is to advise you that if this work is assigned exclusively to employees represented by another union, we will picket the Association contractors and engage in other activity to protect our jurisdiction."

With the written confirmation of Local 18's picketing intentions in hand, TOTAL filed the unfair labor practice charge in this case. After a preliminary investigation established "reasonable cause," Region 30 issued the hearing notice for this Section 10(k) proceeding.

III. STATEMENT OF POSITION

A. <u>There is Reasonable Cause That Service Technician Work Was Subject to Conflicting Jurisdictional Claims.</u>

1. Local 601's Interpretation that Jurisdiction Over Service Technician Work is Exclusive is Sufficient to Find Reasonable Cause that Conflicting Jurisdictional Claims Were Made.

On February 21, 2012, Kevin LaMere informed members of PMC's labor/management committee that service technician work was "[Local 601's] work" that had to be performed exclusively by employees represented by Local 601 employees. According to Braun and Lentz who heard this statement, LaMere also made specific reference to USMA-covered contractors. Local 601's announced intentions were sufficiently specific that LaMere told Braun that he knew the exact number of Local 18 ESTs employed by TOTAL and that he would allow Local 18

ESTs to become Local 601 members if the work assignment were changed. These comments were made in anticipation of the upcoming collective bargaining negotiations.

LaMere says he simply offered an "interpretation" of the NSMA. His interpretation is contrary to the long-standing prior practice of TOTAL employing service technicians from both Local 601 and Local 18. The "interpretation" would represent a departure from the prior practice. The "interpretation" is also contrary to Local 601's admission that work jurisdiction was "not exclusive" under the 14 County WI Area CBA and contrary to the fact Local 601 had never before claimed exclusive jurisdiction. In addition, the interpretation is not based on an accurate reading of the NSMA.

LaMere contends he was simply interpreting the NSMA when he said service work was exclusively for UA members to perform. The record evidence belies any suggestions there was any basis in the record for LaMere's "interpretation" of the NSMA. Absent any basis in fact for this interpretation, it is clear LaMere, rather than offering an "interpretation", was sending a jurisdictional message. Whether the action portion of the jurisdictional message was imminent, near term or to be saved for the upcoming negotiations was not stated. The "interpretation" was undisputedly offered at a meeting to set the table for the 2012 collective bargaining negotiations. The "interpretation" had not been advanced for the many years major contractors in Southeastern Wisconsin were NSMA-covered and openly making dual assignments to employees represented by Local 18 and Local 601. Local 601 had no explanation for the why the new "interpretation" was surfacing when it did. Local 601 made no attempt to explain how the work would be exclusive for Local 601 employees when NSMA contractors for years had made dual assignments and neither the UA nor Local 601 had challenged any of the assignments.

Unions often allege that work claims are contractual, not jurisdictional in nature, in Section 8(b)(4)(D) proceedings under Section 10(k). The Board regularly finds reasonable

cause in such cases as long as the union making the contract claim is making a claim for work. The NSMA is a claim for such work. The Local 601 labor contract is also a claim for such work. And then there are the remarks LaMere and Zielke made at the February 21st dinner.

The work claim to be actionable need not be spelled out in so many words. *Operating Engineers Local 450*, 119 NLRB 339, 343 (1957). Asking that workers be replaced is a jurisdictional claim. *Plumbing and Pipefitting Industry Local 338*, 157 NLRB 290 (1966) and *Int'l Alliance Local 862*, 137 NLRB 738 (1962). The jurisdictional nature of the work claim is not detracted from when based on a contract claim. *Dock Builders Local 1456*, 199 NLRB 453, 455 (1972). Conflicting contract claims to disputed work involve jurisdictional claims. *St. Louis Stereotypers' Union*, 152 NLRB 1232 (1965) and *Carpenters, Local 1780*, 354 NLRB No. 101 (2009). Similarly, a business agent's statement of contract coverage is a jurisdictional claim. *Laborers, Local 1134*, 338 NLRB 472 (2002).

In *Sheet Metal Workers Local 110,* 143 NLRB 947, 950 (1963), the employer wanted to change jurisdictional language in the contracts it had signed with two unions to forestall future jurisdictional disputes. One union rejected this proposal and claimed that, under the jurisdictional clause in its expired contract, it was exclusively entitled to sheet metal work. During the course of negotiations, this union also took the position that some work that it had previously not performed exclusively should be part of its exclusive jurisdiction. The NLRB found reasonable cause that a jurisdictional claim had been made based upon the union's interpretation of its contractual jurisdictional language.

The NLRB concluded that the contract demands made by the union were real and carried with them an equally-real demand for the disputed work. According to the NLRB, the fact that "[t]he Respondent asserted its claim at the time of contract negotiations in the form of a contractual demand does not disguise the fact that it was an attempt to obtain job assignments by demanding the reinterpretation of a contract provision." The NLRB further held that

"jurisdictional demands, in the guise of contract interpretation, are not insulated from the reach of Section 8(b)(4)(D) merely because the work dispute stems from the Employer's and Union's differing interpretations of a jurisdictional clause." The NLRB upheld its long-standing position that contractual claims fall within the scope of Section 8(b)(4)(D) insofar when they are an attempt by a union to secure work for employees it represents. Moreover, the NLRB has repeatedly held that the existence of a contract claim "is an argument addressed to the merits of the jurisdictional dispute, and not to its existence." *Local 338 Plumbing and Pipefitting*, 157 NLRB 290, 293, *Sheet Metal Workers, Local 662*, 151 NLRB 195, 200 (1965) and *Carpenters Local 496*, 151 NLRB 758, 761 (1965).

In *Laborers' Local 113,* 338 NLRB 472 (2002), a union's Business Manager stated that, in his view, his union labor contract gave the union jurisdiction over specific work. The Board considered the union's conduct and actions and found that, "[given] the circumstances, [the Union] ha[d] made a claim for the disputed work." A union that takes the position disputed work is covered by its labor contract is, by definition, asserting jurisdiction over the work. *Id.* at 475, citing to *Laborers Local 931*, 305 NLRB 490, 491 (1991).

In *International Union and Helpers,* 168 NLRB 256 (1967), the union argued that its picketing was not a jurisdictional claim to force the employer to assign work to its members, but rather an effort to "compel compliance" with the labor contract. The NLRB concluded that "the fact that the picket signs were phrased in terms of breach of contract does not alter the nature of the dispute, which, in fact, center[ed] on the demand that the [work] be assigned to members of [the Union]." "[T]he existence of the contract claim [was not] a reason to view this dispute as outside the scope of Section 8(b)(4)(D)." The same conclusion was reached in *International Union Operating Engineers Local 542,* 221 NLRB 869 (1975), where the union's Business Manager asserted a contractual dispute with Westinghouse regarding crane work and subsequently arranged for the union to picket the jobsite to have the crane work assigned to its

members. The NLRB held that, "since the Operating Engineers engaged in picketing to force either reassignment of the crane operator work to its members or payment for the work, [there was] reasonable cause to believe that a violation of Section 8(b)(4)(D) ha[d] occurred and that the dispute [wa]s properly before the Board for determination under Section 10(k)." *Id.* at 870.

Irrespective of whether Local 601's claim was contractual or not in nature, Local 601's statement was an attempt to expand the scope of service work Local 601 employees performed. The claim was that service work is "our [Local 601's] work", that this work had to be performed exclusively by Local 601 members, and that Local 601 would take TOTAL's Local 18 employees in as Local 601 members when the assignment change was made. LaMere also made these very specific work jurisdiction claims in a meeting that was held for the purpose of setting the table for the soon to occur 2012 collective bargaining negotiations between Local 601 and the PMC.

2. Local 601's "Interpretation" of the NSMA is an Exclusive Claim for Service Technician Work.

There appears to be dispute as to the exact words LaMere used in the February 21, 2012 dinner meeting. While LaMere testified as stated above, Lentz and Braun testified that LaMere told them that service technician work was "our work," that Local 601 believed that service work had to be performed exclusively by the employees it represented, and that while LaMere mentioned NSMA-service work Local 601's work claim was not limited to NSMA contractors.

Although neither LaMere nor Zielke specifically stated where and when Local 601 would take action to obtain exclusive jurisdiction over the work in dispute, LaMere made specific reference to USMA-covered contractors and exclusive jurisdiction at a meeting which anticipated Local 601 and PMC contract negotiations in a few months. Braun also testified that LaMere told him that he knew how many Local 18 EST's TOTAL employed and that Local 601

had no problem with these employees becoming Local 601 members if the work assignment was changed.

In a 10(k), the NLRB is not charged with finding a violation of Section 8(b)(4)(D); the NLRB only needs to determine whether there is reasonable cause that a violation occurred. *United Association of Journeymen Local 562,* 329 NLRB 529 (1999); *Local 334, Laborers International* Union, 175 NLRB 609 (1969). The Board does not make findings regarding credibility in 10(k) proceedings. Conflicting testimony between two or more witnesses does not prevent the Board from making a determination of reasonable cause. *Sheet Metal Workers,* 276 NLRB 1200 (1985). The Board can and regularly does use contradicted testimony to find reasonable cause. See *Carpenters Local 1485*, 254 NLRB 1091, 1093 (1981), *Carpenters Local 1400,* 269 NLRB 1141, 1142 (1984), and *Operating Engineers Local 139*, 269 NLRB 1300, 1303, n. 6 (1982).

In *Laborers Local 231,* 204 NLRB 37 (1973), the union interpreted the labor contract to grant it exclusive jurisdiction over the disputed work, yet claimed this was merely its contract interpretation and not a jurisdictional claim. There, as here, the union stated that employees who were already performing the work sought could continue to do so if they became members of the union seeking to perform the work. The NLRB dismissed the union's motion to quash, concluding that "the overall objective was to secure work for employees then represented by it." *Id.* at 39.

Two different witnesses testified that LaMere referred to the work in dispute as Local 601's work, that the work had to be performed exclusively by Local 601-represented employees and that Local 601 claimed exclusive jurisdiction over the work. Braun testified that LaMere made specific reference the number of Local 18 employees TOTAL employed in the context of having those employees join Local 601 if the work assignment were changed. Because LaMere's "interpretation" of the NSMA would make Local 601's jurisdiction over the work in

dispute exclusive, the interpretation is an aggressive expansion of Local 601's work. The statements made by Local 601's representatives clearly constitute jurisdictional claims for Section 10(k) purposes.

B. Local 18 Threatened to Picket if Contractors Changed the Service Technician Work Assignment.

1. Local 18 Immediately Threatened to Picket When Learning of Local 601's Claim of Exclusive Jurisdiction.

On March 1, 2012, Lentz and Braun met with Landgraf to inform him of Local 601's new work claim. They also explained to Landgraf the potential implications for both Local 18 and affected contractors, given that PMC-represented contractors might have to change their work assignment practice in the future. Landgraf immediately and forcefully told Lentz and Braun that Local 18 would picket to protect its stake in the work in dispute. Both Lentz and Braun saw that Landgraf was upset by this development. They understood Landgraf's forceful and unambiguous statement of intention to protect Local 18's stake in the work by all means necessary, specifically including picketing or striking. Three weeks later, upon being told in writing of Local 601's exclusive jurisdictional claim, Local 18 answered in writing that it would picket contractors that changed the work assignment.

Local 18 could not afford to lose jurisdiction over service technician work. Local 18 had invested substantial time, effort and resources to train EST's. This work represented substantial industry work hours for Local 18. Given Local 601's stated intent to accept Local 18 ESTs as members, Local 18 stood to lose a substantial number of its members, hours worked, fringe benefit fund contributions, and union dues. Not surprisingly, Local 18 immediately informed TOTAL that it intended to take action, including picketing to prevent this work from being lost. This was merely confirmed when Landgraf testified that Local 18 would deal with the jurisdictional dispute "with every way that was necessary to make sure [his] guys didn't get laid off or become unemployed" (Tr. 187).

Local 601 questions Local 18's willingness to picket or strike. However, Local 601 has failed to offer any direct evidence calling that intent into question. Direct evidence that Local 18 was not serious about its willingness to strike or picket is what Local 601 would have to prove to establish that Local 18 did not make a genuine threat. Absent direct evidence of a sham threat and of Local 18's actual interest in pursuing prohibited action, the Board takes threats stated at face value and rules against motions to quash.

Local 601 may also argue that Landgraf never actually voiced Local 18's specific desire to picket against Local 601. Besides this as an inaccurate account of what Landgraf said, the NLRB cases hold that lack of specificity or details in a written or verbal threat of prohibited action is itself not enough to quash a 10(k) hearing. No specific words are required for a threat to be deemed serious enough to warrant the Board's intervention in a 10(k) hearing. *Lancaster Typographical Union No. 70,* 325 NLRB at 450 ("We cannot agree with GCIU Local 160's contention that Local 70's threat was not genuine. We see nothing vague about this threat"). The Board has also determined that even the existence of a no-strike clause in the parties' collective bargaining agreement is not, by itself, suggestive of a lack of seriousness in a union's threat to strike or picket. *Brewers and Maltsters and Bottlers (Anheuser-Busch, Inc.),* 270 NLRB 219 (1984).

The standard set forth by Board precedent for a finding of reasonable causes is whether or not there is reasonable cause to believe that the prohibited conduct occurred. *Massachusetts Laborers' District Council,* 290 NLRB 300 (1988). In *United Brotherhood of Carpenters, 351 NLRB 1417 (2008),* the Board concluded that "direct evidence that Local 623 did not intend its threat seriously" was lacking. See also *Laborers' Union Local 113,* 338 NLRB at 476 (holding direct evidence required to prove that threats "intended to warn the Employer that it would take economic action, including striking" were actually a "sham").

Landgraf undisputedly threatened to take prohibited action. Both TOTAL and the association considered the threats real and took them seriously. Landgraf testified that he would take action by any means necessary to prevent Local 18's loss of work to Local 601. Landgraf's words clearly indicate that Local 18 considered Local 601's claim to be fighting words, an encroachment on Local 18's work, and not something Local 18 would tolerate. Absent direct evidence that clearly proves otherwise, Local 601 cannot prove and has not proven that Local 18 threats were benign, not serious, and a sham.

Informing Local 18 of Local 601's exclusive work claim to the work in dispute is not collusion. TOTAL had ample legitimate, business-related non-collusive reasons to meet with Local 18, to explain Local 601's claim and to discuss the potential implications for TOTAL and other area contractors. The standard in collusion cases is direct proof. As here, in the absence of direct affirmative evidence of collusion, the Board will dismiss motions to quash predicated on allegations of collusion. *Laborers International Union,* 340 NLRB 1256 (2003); citing *Lancaster Typographical Union No. 70, supra.* For another other case where the necessary proof was lacking, *see Plumbers Local 562,* 328 NLRB 176 (1999).

Similar to this case is *Shopmen's Local Union,* 266 NLRB 963 (1983). There the employer posted a notice in the workplace informing one union's (Shopmen's) employees that another union had claimed the disputed work. A potential reassignment of the work in dispute was mentioned in the notice if the union successfully asserted its claim for the work. The union which represented the employees who performed the work struck and picketed immediately after the notice was posted by the employer. The NLRB concluded that, "[c]ontrary to Glaziers' assertion, [it could not] agree this was a sham strike" because it was in response to a claim by one union that would take work from another union. *Id.* at 965.

The Board has also denied motions to quash based on allegations an employer collusively encouraged the union to threaten prohibited action. In *Laborers International*

Local 271, 341 NLRB 533 (2004), the union alleged that the employer had "colluded with another union in encouraging that union to make [threats]," in order to obtain a Board determination that the work belongs to employees represented by the Laborers." In response to move to quash, the employer responded "that reasonable cause exist[ed] to believe that the Laborers' threats were serious and genuine, and that, based on Board precedent, the evidence is insufficient to demonstrate otherwise." The NLRB found no direct evidence of collusion, particularly when no individual from the employer had admitted to any collusive activity. "In the absence of affirmative evidence that a threat to take proscribed action was a sham or was the product of collusion," the NLRB ruled, "[it] will find reasonable cause to believe that the statute has been violated." *Id.* at 534-535.

Local 18 seeks to further support its position of collusion by making reference to email exchanges in which the procedure for commencing a jurisdictional proceeding were discussed. Local 18 argues that the 10(k) dispute is contrived. After Local 18 unequivocally verbally stated its intention to picket, TOTAL had follow-up communications about the possibility of a Section 10(k) proceeding. Association representatives did not know what the Section 10(k) process involved or how a Section 10(k) proceeding was commenced. Landgraf testified he was familiar with the 10(k) process; however, Landgraf suggested and Lentz confirmed that the association was not. Landgraf simply told Lentz and Braun to check with the association's legal counsel about "avenues" to pursue for resolving this dispute (Tr. 180). Landgraf did <u>not</u> say what was involved in the 10(k) process, what was required for a 10(k) action, or what the association should do except check with legal counsel.

From the time of the March 1st meeting, Lentz intended to send Landgraf a letter about Local 601's jurisdictional claim (Tr. 86). Lentz finally did so on March 21, 2012 after he had learned enough about the 10(k) process to know that an affected contractor needed to be identified in order for the NLRB to make an award of the disputed work. Landgraf and Lentz did

not discuss the content of this letter. Lentz did not know how Local 18 would respond to the letter. In particular, Lentz and Landgraf did not discuss what Local 18's response would be to Lentz's letter.

When Landgraf's written response was the same as Local 18's verbal response three weeks earlier, it was clear that Local 18 would fight to keep service technician work. Local 18's response was not the product of collusion but of its real and genuine desire not to lose service work to Local 601-represnted employees. In *Painters Local Union No. 8,* 317 NLRB 585 (1995), a union's Business Manager sent a letter to the employer threatening to strike with the stated purpose of starting a 10(k) proceeding. The other union claimed the threat was a sham. The NLRB found that the letter "on its face constitute[d] a threat of prohibited activity" and that "there [was] insufficient evidence to conclude that the threat was not made seriously". This conclusion was supported in part by the testimony of the union business manager that his union was willing to undertake any action necessary to protect against the union's loss of work. It did not matter then and it does not matter now if Local 18 sent the letter to Lentz to start the 10(k) process. *Cincinnati Mailers Union No. 17*, 265 NLRB 1052, 1053 (1982) (statement "on its face constitutes a threat" and no evidence union "not serious" nor in collusion when making the threat).

Motions to quash based on circumstantial evidence based on the timing of a threat to strike in relation to the filing of a charge with the NLRB have consistently been dismissed by the NLRB as not the product of collusion. *Laborers International Union,* 344 NLRB 201, 202 (2005) ("[i]n the absence of affirmative evidence that a threat to take proscribed action was a sham or was the product of collusion, the Board will find reasonable cause to believe that the statute has been violated."); *International Union of Bricklayers*, 343 NLRB 1030, 1032 (2004) ("the Iron Workers does not, however, offer any direct evidence to show that the Bricklayers did not intend its threat seriously. In the absence of such evidence, it is well settled that where a charged party

has used language that on its face threatens economic action, the Board will find reasonable cause to believe that Section 8(b)(4)(D) has been violated"); *Denver Newspaper Guild,* 199 NLRB 34 (1972) ("There is no evidence of collusion between the Employer and the Guild. On the entire record, we conclude that there is reasonable cause to believe that there has been a violation of Section 8(b)(4)(D) of the Act, and that the dispute is properly before the Board for determination pursuant to Section 10(k) of the Act.").

C. TOTAL Should be Allowed to Continue to Assign the Work in Dispute to Employees Represented by Local 18 and Local 601.

Recognized criteria under Section 10(k), as discussed below, establish that the Work in Dispute should not be awarded exclusively to Local 601-represented employees. Instead, the 10(k) criteria establish that the Board should award the work so that TOTAL's dual assignment preference and practice continue.

1. Employer Preference.

TOTAL has a Service Division business model that depends on Local 18 and 601 employees performing the Work in Dispute. Over the last 24 years the Service Division at TOTAL has grown from small to substantial in part because of the dual assignment practice. The dual assignment practice allows service technicians to be dispatched without regard to union affiliation and based on availability, geographic-proximity, skills, and customer relationships. TOTAL's preference for making dual assignment is of long-standing, a function of its business model, and important to the growth and success of the Service Division.

The ousting of Local 18 and the granting of exclusive jurisdiction to Local 601 would cause substantial business problems for TOTAL. First, TOTAL would lose the opportunity to build the most qualified service technician work force through the employment of Local 601 and Local 18 service technicians. Second, TOTAL would also lose the "healthy competition" between Local 18 and Local 601 employees which has made service technicians into the best

work force they could be for TOTAL. Third, TOTAL would lose the benefit it has gained from training programs which push each other to take advantage of new technology, train workers in new service methods, and offer state of the art training for apprentices and journeymen alike. Fourth, Local 601 would not be able to provide all of the service technicians TOTAL would need to meet customer demand.

2. Employer Practice.

For 24 years TOTAL's assignment practice on hundreds of thousands of service jobs has been to assign the Work in Dispute without regard to union affiliation and based upon considerations of availability, geographic proximity, skills and customer relationship. Union affiliation was not a dispatch consideration. Exclusive jurisdiction was not claimed by Local 601 or Local 18 on any of TOTAL's hundreds of thousands of service jobs. TOTAL's assignment practice compellingly favors a continuation of dual assignments and precludes exclusive Local 601 jurisdiction.

3. Area Assignment Practice.

Local 601 concedes it does not claim exclusive jurisdiction over service work under the area collective bargaining agreement (Tr. 214). Not surprisingly, the area assignment practice reflects widespread dual assignments in the historical absence of Local 601 claiming exclusive jurisdiction. Dual assignments make up the assignment practice for the mechanical contractors the PMC and the SMACCA represent in the Local 601 and Local 18 union relationships.

4. NSMA-Covered Contractors Assignment Practice.

Eight (8) PMC-represented contractors are NSMA independent signatories. The record evidence is undisputed that service work is a dual assignment for those contractors, not the exclusive jurisdiction of Local 601. In fact, LaMere and Local 601 would not have raised the work assignment issue if Local 601 actually had exclusive jurisdiction. Because NSMA signatories do not assign service work exclusively to Local 601 employees, the contractors were

upset when LaMere made the new work claim at the February 21st dinner meeting. There is no record evidence that NSMA-covered contractors, whether PMC-represented or not, exclusively assign service work to employees Local 601 represents.

5. Skills Involved.

TOTAL is assured maximum skills and qualified worker availability because of the dual assignment practice. Employees coming through the formal training program give TOTAL the best chance to have a reliable service technician work force of the most highly qualified available service technicians. The reliable availability of skilled workers would be compromised for TOTAL if only employee represented by Local 601 were assigned to the Work in Dispute.

6. Efficiency and Economy.

The damage to TOTAL's business model, as described above, would adversely affect Service Division efficiency and economy. TOTAL's dual assignment preference is grounded in considerations of efficiency and economy which would no longer be possible if Local 601 employees had to be assigned to all of TOTAL's service jobs. Customer relationships would be changed and customer identification with a known and trusted service technician would be jeopardized. TOTAL would not have access to the most qualified workers from the two unions or sufficient numbers of qualified workers if Local 601 were the single source of service technicians. The overall availability of needed skilled workers would be compromised for TOTAL as well if the dual sources had to become a single source.

7. Inconclusive Factors.

Several recognized 10(k) factors have no impact on the award of the Work in Dispute. There are no inter-union jurisdictional agreements or decisions and there are no joint board decisions of record regarding service work. The relevant collective bargaining agreements all contain broad and overlapping jurisdictional claims. No party offered any evidence regarding industry practice.

8. Conclusion on the Merits of the Dispute.

Each of the factors listed above in sub (1)-(6) favors continuation of the dual assignment and precludes any basis for the NLRB to award all of TOTAL's service work to Local 601-represented employees. In summary, no recognized Section 10(k) criterion favors exclusive Local 601 jurisdiction. The above criteria, to the contrary, establish that the Work in Dispute should be awarded to TOTAL's employees represented by Local 18 and 601.

IV. SCOPE OF AWARD

The nature of TOTAL's service jobs and dispatch system is such that a determination should be made by the NLRB regarding the assignment of the Work in Dispute in the Fourteen County WI area. For jobs that take only a few hours to complete, it makes no sense to make work determinations on a customer job by customer job basis. The service work in dispute is the equivalent of a particular work assignment at a business location. The NLRB has no difficulty making an ongoing award of work in such circumstances and having the award apply to disputed work that is later performed at that location.

Here the service work in dispute will be performed on an ongoing basis but at multiple customer locations. The nature of service work is such that the NLRB's work determination affects customers located in the 14 County WI area. The NLRB's award of work should recognize this fact, as the NLRB did in *Sheet Metal Workers Local 9*, 250 NLRB 724, 729 (1980).

> "Although we usually limit our determination of a dispute to the particular controversy which gave rise to the 10(k) proceeding, in this case the nature of the Employer's business, i.e., performing various jobs at the same time with a stable work force which is constantly interchanging, indicates that the dispute is not restricted to one jobsite. Indeed, the circumstances here, including an alleged threat by the Sheetmetal Workers to picket the Employer wherever it is found, and whenever it is doing sheetmetal workers' work, indicate that this dispute is likely to arise again at other locations in Colorado where the Employer is performing work. Accordingly, the scope of our award encompasses the area of the Employer's operations in Colorado."

DATED this 14th day of May, 2012.

Respectfully submitted,

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By: _____
Thomas W. Scrivner
Counsel for TOTAL Mechanical

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

LOCAL UNION NO. 18 OF SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION

and Case 30-CD-078120

TOTAL MECHANICAL

and

LOCAL UNION 601 STEAMFITTERS AND
REFRIGERATION/SERVICE FITTERS

CERTIFICATE OF SERVICE

I, Lynda E. Moser, a Legal Assistant with the law firm of Michael Best & Friedrich LLP, hereby certify that on May 14, 2012, I sent via email a copy of the Post-Hearing Brief of Total Mechanical to the parties listed below:

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Executive Secretary, NLRB via electronic filing

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